



US Army Corps
of Engineers ®

Construction Bulletin

No. 98-5 Issuing Office: CEMP-EC Issue Date: 7/9/98 Exp. Date: 31 DEC 2000

CEMP-E

Subject: Variation in Estimated Quantities Subdivided Items (VEQ SI) - Armed Services Board of Contract Appeals' Decision

Applicability: GUIDANCE

1. **REFERENCE:** Construction Bulletin (CB) No. 97-7, Use and Administration of the Variation in Estimated Quantities Clauses (FAR and EFARS), dated 6 Mar 97.

2. **PURPOSE:** The purpose of this Construction Bulletin (CB) is to bring to your attention a recent decision by the ASBCA (Met-Pro Corporation, ASBCA No. 49694 decided May 14, 1998) concerning the administration of the EFARS clause, Variation in Estimated Quantities Subdivided Items (VEQ SI).

3. BACKGROUND:

a. A contract was awarded to Met-Pro for the removal and clean-up of petroleum storage tanks. The contract contained several line items which included item 1 for the removal of above and under ground fuel storage tanks and item 2 (composed of two sub line items 2A and 2B) was for excavation and disposal of petroleum contaminated soil. A unit price was solicited for the first 150 cubic yards (c.y.) under sub line item 2A. A unit price was also solicited under item 2B for the subsequent 250 c.y. which would also apply to additional quantity over 250 c.y. (to the extent required.) The excavation of petroleum contaminated soil under item 2 was considered incidental to the tank removal. Under the contract, the contractor was required to remove all petroleum contaminated soil, test the soil at the bottom of the excavation until the material was found to be "clean," use only non-contaminated soil for backfill, and to obtain from off-site borrow areas clean backfill at its expense, if required beyond backfill produced by excavation.

b. The Invitation for Bid (IFB) contained boring logs which showed that the petroleum contamination in the soil (to be removed under item 2) was low enough to allow the soil to be used as backfill.

CEMP-EC

Subject: Variation in Estimated Quantities Subdivided Items (VEQ SI) - Armed Services Board of Contract Appeals' Decision

c. Met-Pro Corp. was the successful bidder and bid \$40/c.y. for both sub line items 2A and 2B.

d. During performance, Met-Pro excavated a total of 3,832.5 c.y. of petroleum contaminated soil under item 2 which was mostly unsuitable as backfill material due to a high level of contamination that resulted from an undetected tank leak. Met-Pro subsequently submitted a claim which included a costs of \$101.46/c.y. for the overrun quantity under sub line item 2B (3,432.5 c.y.) The claim was mainly due to the unforeseen need to purchase and transport clean backfill from off-site borrow areas. The claim was submitted pursuant to the Differing Site Conditions clause.

e. The responsible USACE district's position was that the contractor was only entitled to the bid price of \$40/c.y. for the overrun quantity and to time extension. The district argued that the VEQ SI clause precluded an adjustment of the unit price of a subdivided item.

4. SUMMARY OF DECISION: The ASBCA held that Met-Pro is entitled to a unit price adjustment under the Differing Site Conditions clause for the additional costs it incurred due to a material variation from the Government's estimate of the quantity of work. The ASBCA ruled that the contractor has established the following elements of proof: (1) the contract documents contained reasonably plain or positive indications of the site conditions that form the basis of the claim; (2) the contractor reasonably interpreted the contract documents and relied upon the indicated site conditions; (3) the conditions actually encountered at the contract site differed materially from those indicated in the contract; (4) the site conditions encountered existed at the time the contract was executed and were unforeseeable based on all the information available at the time of bidding; and (5) the contractor's injury was caused solely by the materially different site conditions. The ASBCA also concluded that the contractor satisfied the criteria for recovery under a previous court decision (*United Contractors*) which stated:

The Estimated Quantities clause is a ready vehicle for adjusting, with a minimum of haggling, the compensation received by contractors who are called upon in the course of performance to do, within limits, more or less work than could be estimated. But we have held that clauses of this type do not control when the cost of doing the extra work greatly differs from the stated unit-price because of factors not foreseen by either party. In that event, the Differing Site Conditions clause comes into play and overrides the VEQ clause.

CEMP-EC

SUBJECT: Variation in Estimated Quantities Subdivided Items (VEQ SI) - Armed Services
Board of Contract Appeals' Decision

5. RECOMMENDATION: Construction contract administrators need to be familiar with the specifics of this case and the ASBCA ruling. If you have any questions regarding this case, recommend that you contact your local office of counsel for advise.

6. This CB was coordinated with the following HQUSACE organizations; office of the Chief Counsel (CECC-C and CECC-F); and Operations, Construction, and Readiness Division (CECW-O).



KISUK CHEUNG, P.E.
Chief, Engineering and Construction Division